No. 11759

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS W. SCOTT,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This action was brought in the District Court of the United States for the Southern District of California, pursuant to the provisions of Section 24 of the Judicial Code, Title 28, U. S. C., Section 41(1)(2). Judgment was entered therein May 14, 1947. Notice of appeal was filed on August 8, 1947. The United States Court of Appeals for the Ninth Circuit has jurisdiction under Section 28 of the Judicial Code (Title 28, U. S. C., Sec. 225).

Statement of the Case.

This is an appeal from a jury verdict in favor of the defendant in an action for damages brought by the United States Government. It prays for the sum of $10,590.55 damages to a Government-owned airplane as a result of

a collision occurring with an airplane owned and operated by the defendants. The accident occurred at the Los Angeles Municipal Airport on November 11, 1943, at 2 o'clock in the afternoon, with visibility unlimited.

Defendants in their answer deny any liability on their part and allege negligence on the part of the plaintiff in parking the Government's plane on the diagonal runway and, further, negligence on the part of the control officers at the air traffic control tower in directing defendant to proceed without warning of the parked plane. They further allege that the plaintiff's negligence did proximately cause and contribute to the accident.

Statement of Facts.

It is the plaintiff's contention that there was no dispute in the facts introduced in evidence.

Witnesses for the Government and defendants alike testified as follows:

That on November 11, 1943, at the Los Angeles Municipal Airport, Los Angeles, California, on a diagonal runway, a collision occurred between a P-51 airplane, having a 37-foot wing spread, owned and operated by the plaintiff, and a S.B.D. airplane, having a 42-foot wing spread, owned and operated by the defendants, whereby damage in the sum of $10,589.61 occurred to the plaintiff's plane.

The Los Angeles Municipal Airport consists of two main runways which are 300 feet wide, macadamized strips running the length of the field, parallel to each other but separated by a clear plot of ground. Diagonally, from the four corners of the field 150 feet wide, macadamized runways bisect the main runways.

The Los Angeles Municipal Airport, at the time of the accident, was managed by employees of the City of Los Angeles. The United States Government was a tenant of the City of Los Angeles, as were many others, including the Civil Aeronautics Authority, an agency of the Government, whose employees operated the air traffic control tower.

A. W. Pitcairn, the operator of the plaintiff's P-51 airplane, was employed by the North American Aviation Company as an experienced pilot, authorized to make test flights for the Government.

On November 11, 1943, the day of the accident, Pitcairn, since deceased, was assigned to make a test flight for the Government to determine the air flow characteristics of the coolant scoop of the P-51 aircraft (the one involved).

In accordance with custom, practice, and usage at the Los Angeles Municipal Airport, the air traffic control tower was informed that said test was to be made. It was the custom, practice and usage that in this type of test the plane to be tested would be towed to its starting point rather than taxied under its own power because dust blown by the propeller upon taxiing the plane would be thrown into the scoop, which would close up the rake openings, thereby nullifying the test. This was true also upon landing, and to prevent this happening when the plane wheels touched the ground the pilot would cut the motor and coast down the main runway to the intersection of the diagonal runway, turn down the diagonal runway and park as close to the edge as possible, requesting the control tower for the tow tractor to come out and tow the plane.

The plaintiff's P-51 aircraft was towed by a tractor out onto the landing strip, whereupon it took off for its test flight. The P-51, on its return to the field, landed, with permission of the air traffic control tower, on the main runway, 25-L, which was to the left running parallel to the main runway, 25-R. The pilot immediately cut off the motor, coasting down the runway to the intersection of the diagonal runway where the plane turned to the left and parked on the right side of the diagonal runway with its wheels on the edge of the macadam, its right wing extending over and beyond the macadam onto the unpaved portion of the airport. The diagonal runway being 150 feet in width, the P-51 airplane so parked left better than a 120-foot passage for other planes to taxi on the diagonal runway. Pitcairn, the pilot, immediately contacted the air traffic control tower by radio, requesting a tractor to tow the P-51 onto the ramp.

Thomas W. Scott, one of the defendants, was operating a Douglas S.B.D. airplane which collided with the P-51. He was employed by Douglas Aircraft Company to conduct regular production tests on S.B.D. airplanes and had been conducting a number of such tests at the time of the collision.

While still in the air, operators in the air traffic control tower gave Scott permission to land his S.B.D. plane and, pursuant thereto, he landed the S.B.D. plane on runway 25-R, coasting down to the diagonal runway, then turning left into said diagonal runway until he approached the opening of the intersection where the diagonal runway crossed the main runway, 25-L. Scott then held his position there and watched a plane take off on the main runway, 25-L. The control tower then gave him permission to cross the main runway. Scott taxied the

S.B.D. airplane across the main runway, 25-L, in a hurry, and upon entering the diagonal runway on the other side of the main runway he started S-ing (essing) his plane. Completing the first turn, he collided with the P-51 parked on the edge of the runway. Scott testified he S-ed (essed) so he could see in front of his plane. He could not remember if he looked all the way down the diagonal runway but knew he could see all the way down; that he definitely did look down the diagonal runway after stopping at the intersection of the main runway, 25-L, and the diagonal runway; when he S-ed (essed) down the diagonal runway before the collision he did not look directly in front of him although he S-ed (essed) his plane right and left in order to get a clear, unobstructed view of the diagonal runway; that he looked ahead of him but did not see the plaintiff's P-51 airplane until he ran into it; that it was a clear day; that there was a 120-foot clearance on the side of plaintiff's plane, and even with the propeller revolving, you can see that area; and that he had good visibility in front and made 15-degree angles from center in S-ing (essing).

The fact that the defendant looked and did not see plaintiff's P-51 is borne out by his own testimony and conversation with Pitcairn at the scene of the accident and the fact that the brakes were applied by Scott at about the time of the impact.

The air traffic control tower operators do not customarily warn of obstructions in runways when planes are taxiing. This is especially true where the obstruction is

in plain view. Further, at the time of the accident in question heavy air traffic ensued and at all times and under all conditions air traffic takes precedence over field traffic. There are no field rules restricting parking on the edge of the diagonal runways.

Assignment of Errors.

Points upon which appellant intends to rely on the appeal are as follows:

1. The Court erred in not granting plaintiff's motion for a directed verdict at the conclusion of the trial.

2. The Court erred in not finding as a matter of law that the plaintiff's acts did not constitute contributory negligence.

3. The Court erred in not finding as a matter of law that the proximate cause of plaintiff's damage was the negligence of the defendants.

4. The Court erred in permitting the cause to go to the jury.

5. The Court erred in not granting plaintiff's motion for judgment or a new trial.

6. The evidence does not sustain the verdict of the jury.

For convenience in discussing the same, these six assignments of error will be divided into two main points.

I. The Lower Court Erred in Denying Plaintiff's Motion for a Directed Verdict.

II. The Evidence Is Insufficient to Sustain the Verdict of the Jury.

I.

The Lower Court Erred in Denying Plaintiff's Motion for a Directed Verdict.

It is the Government's contention that the evidence is undisputed and should not have been submitted to the jury because from the facts only one inference can be drawn, that the proximate cause of the damage to the Government plane was the negligence of Defendant Pilot Scott in failing to look where he was going.

Generally, questions of negligence in actions like the present are for the jury, under proper directions as to the principles of law by which they are controlled. However, it is well settled that the Court may withdraw a case from the jury altogether and direct a verdict for the *plaintiff or defendant,* as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. As the Court said in the case of *Brady v. Southern Ry. Co.* (320 U. S. 476):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. * * *"

Galloway v. United States, 319 U. S. 372;

Pence v. United States, 316 U. S. 332;

Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521;

Anderson v. Smith, 226 U. S. 439;

Coughran v. Bigelow, 164 U. S. 301;

Gunning v. Cooley, 281 U. S. 90.

A. The Failure of the Defendant Pilot in Looking and Not Seeing What Was in Plain Sight Constituted Negligence.

> "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, with reference to the situation and knowledge of the parties under all the attendant circumstances."

Stephenson v. Southern Pacific Co., 102 Cal. 143;

Fouch v. Werner, 99 Cal. App. 557; 279 Pac. 183;

Terrell v. Key System, 69 Cal. App. (2d) 682; 159 P. (2d) 704;

Toschi v. Christian, 24 Cal. (2d) 354; 149 P. (2d) 848;

Parrot v. Wells Fargo & Co., 82 U. S. 524;

Bramley v. Dilworth, 274 Fed. 267.

The undisputed evidence discloses that the Government's P-51 plane at the time of the collision was parked upon a taxi strip on a diagonal runway; the diagonal runway was 150 feet in width; Pitcairn, the pilot of the P-51, was seated therein, with the motor dead and the plane incapable of movement; that he had shut off his motor upon the wheels of the plane touching the ground; and that thereafter, having crossed into the diagonal runway, Pitcairn had contacted the operators of the air traffic control tower, requesting a tractor to be sent out to the parked plane to tow it onto the ramp. The P-51, it was testified, was parked with its right wheel close to the edge of the diagonal runway so that only the fuselage and left wing protruded into the taxi strip, leaving better than 120 feet of clearance for other planes to pass.

Defendant Pilot Scott testified that he landed on main runway 25-R at approximately 2 o'clock in the afternoon; that it was daytime and visibility was good; that he taxied down the diagonal runway, making S turns at a 15° angle in order to see that the way was clear, to approximately the intersection of the main runway 25-L (the runway upon which originally the Government plane had landed) and the diagonal runway he was on; that at that point he stopped and turned his plane in an easterly direction; that he stayed there a matter of a minute or a minute and a half and watched a plane take off in a westerly direction from main runway 25-L; and, further, he looked across the main runway 25-L and down the diagonal runway that he was on, and upon which the Government's P-51 was parked; that he then requested permission from the air traffic control tower to cross the main runway 25-L, which he did, but that he crossed it "in a hurry" as he was anxious to get across the main runway in case somebody else might be landing that he didn't see; that after he crossed main runway 25-L and had entered into the diagonal on which the Government's P-51 was parked he started taxiing and S-ing his plane in a 15° angle from right to left in order to see whether his way was clear; that he looked but did not see the Government plane and collided with it.

Defendant Pilot Scott further stated that he taxied slowly at a speed of from 8 to 10 miles an hour as a safety measure and that he S-ed from right to left in order to get a clear view of the diagonal runway upon which he was traveling; and that even when the plane was headed straight ahead and the propeller was revolving he could see the area before him.

The defense placed upon the stand three witnesses who testified without any equivocation that they could see from a distance of over 300 feet, not only the Government P-51 parked upon the diagonal taxi strip, but that they saw the Government's pilot, Pitcairn, when he talked to the air traffic control tower, requesting the tow tractor.

> "The general test of negligence is foreseeability. Conduct is negligent when some unreasonable risk or danger to others would have been foreseen by a reasonable person."

Sweatman v. L. A. Gas & Elec. Corp., 101 Cal. App. 318; 281 Pac. 677;

Asher v. Pacific Electric Ry. Co., 42 Cal. App. 712; 187 Pac. 976;

Schwerin v. Capwell, 140 Cal. App. 1; 34 P. (2d) 1050;

Eigner v. Race, 54 Cal. App. (2d) 506; 129 P. (2d) 444;

Parrot v. Wells Fargo & Co., supra.

By the defendants' evidence produced at the trial, Defendant Pilot Scott had a duty, as a reasonable man under all the attendant circumstances, to maintain a lookout in taxiing the defendant's S.B.D. airplane and to avoid running into and injuring the person or property of others. The defendants admitted that visibility was good, that it was a clear day, clear enough, in fact, that the pilot could be seen at a distance of over 300 feet talking into a microphone in the parked plane. The very act that the defendant pilot was doing, to wit, taxiing at a slow rate of speed, S-ing his plane in 15° angles from right to left to avoid running into any other person that might be upon the diagonal runway, shows that unless

precautions of this type were taken damage or injury to others might occur.

The defendant further testified that he looked, not one time but continued looking all the time, and he did not see the parked P-51 airplane of the plaintiff. It was further testified that when tests of this type were made it was the custom and practice to park the planes on the diagonal runways, leaving the remainder of the runway for other taxiing planes to pass.

> "One is deemed negligent where he fails to see what is in plain sight. Failure to maintain a proper lookout is negligence."
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> *Reaugh v. Cudahy-Packing Company,* 189 Cal. 335; 208 Pac. 125;
>
> *Truitner v. Knight,* 83 Cal. App. 655; 257 Pac. 447;
>
> *Nichols v. Nelson,* 80 Cal. App. 590; 252 Pac. 739;
>
> *Mahar v. Mackay,* 55 Cal. App. (2d) 869; 132 P. (2d) 42;
>
> *White v. Davis,* 103 Cal. App. 531; 284 Pac. 1086.

It is a general rule of law that where the injury or damage has resulted from an operation of an instrumentality the operator is held to have been responsible where it appears that he ought to have foreseen and prevented the injury or damage.

It is apparent that by the very evidence produced in defense of this action that Defendant Pilot Scott violated the duties incumbent upon him as a reasonable man under the circumstances. One cannot be heard to say "he looked but did not see what was in plain sight." The failure to keep proper lookout constituted negligence upon the part of Defendant Pilot Scott.

In *Williams v. Pacific R. R. Co.* (177 Cal. 235; 170 Pac. 423), the Court said:

> "Where it appears from the undisputed facts, judged in the common light of knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in like positions, or that the necessity of doing a particular act is apparent, and the custom of performing such act under certain circumstances is universal and relied upon, negligence may be declared as a matter of law."

Chrissinger v. Southern Pac. Co., 169 Cal. 619; 149 Pac. 175;

Litlerbury v. Kimmet, 183 Cal. 24; 195 Pac. 660;

Woodhead v. Wilkinson, 181 Cal. 599; 185 Pac. 851.

The Government therefore submits that the Court erred in submitting to the jury the question of the negligence of Defendant Pilot Scott for the undisputed facts judged in the light of common knowledge and experience disclosed that Defendant Pilot Scott had not exercised such care as a reasonable man would in a like or similar circumstance.

B. Plaintiff's and Appellant's Acts Did Not Constitute Contributory Negligence.

It was at all times contended by the defendants that the parking of the plane by the Government's pilot, Pitcairn, on the diagonal runway, and the failure on the part of the operators of the air traffic control tower to notify Defendant Pilot Scott that the Government's plane was so parked, shows contributory negligence on plaintiff's part.

Like the defendants' negligence, contributory negligence becomes a question of law when the evidence is such that the Court is impelled to see that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference.

Hamlin v. Pac. Elec. Ry. Co., 150 Cal. 776; 89 Pac. 1109;

Reaugh v. Cudahy Packing Co., 189 Cal. 335; 208 Pac. 125;

Young v. Southern Pacific Co., 182 Cal. 369; 190 Pac. 36;

Minter v. San Diego Consol Gas et al. Co., 180 Cal. 723; 182 Pac. 749.

"Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as concurring or cooperating with the negligent act of the defendant, is the proximate cause of the injury complained of."

Straten v. Spencer, 52 Cal. App. 98; 197 Pac. 540;

Rush v. Lagomarsino, 196 Cal. 308; 237 Pac. 1066;

Gaster v. Hinkley, 85 Cal. App. 55; 258 Pac. 988;

Hartford v. Pac. Motor Trucking Co., 16 Cal. App. (2d) 378; 60 P. (2d) 476.

Merely because one person is at fault does not dispense with the duty of another to use ordinary care. Although an attempt was made by the defendants to substantiate a defense of contributory negligence, the facts do not show that the parking of the plaintiff's P-51 plane on the edge of the diagonal runway was a violation of any rules or regulations applicable to the field. Rather, it is shown that the test of the P-51 plane was conducted under the

usage and custom in effect at that time. Three times the amount of space was left for passage on the diagonal runway as would have been taken up by the defendants' S.B.D. plane. The Government's employees, the operators of the air traffic control tower, had the duty of handling air traffic, yet without question air traffic took precedence over ground traffic, and at the time of the collision, and just prior thereto, air traffic was very heavy. In fact, it was testified to, and uncontradicted, that the usual custom and practice of the operators of the air traffic control tower did not include giving notice of obstructions on the field, especially so when an object was in plain sight.

From all the evidence it is undisputed that there were no rules preventing the parking of the Government P-51 plane on the diagonal runway. In fact, it was custom and usage to do so. Further, there was no duty upon the part of the operators of the air traffic control tower to notify taxiing planes of objects on the field. There being no violation of any legal duty in the parking of the plane, and there being no omission of any duty by the operators of the air traffic control tower in failing to notify the defendant pilot that a plane was so parked, negligence cannot be found on either the part of the Government's pilot nor the employees of the air traffic control tower. It is a general rule of law that without such a legal duty any injury is *damnum absque injuria*—injury without wrong.

It is respectfully submitted that the Court not only erred in giving Defendants' Instructions Nos. 18, 19, 21, 22, 23, 25 and 29 on contributory negligence, over the

objection of the plaintiff, but also erred in submitting the question of contributory negligence to the jury. Only one reasonable inference may be drawn from the undisputed facts: there being no legal duty owing to the defendants by the plaintiff's employees or agents, there can be no contributory negligence.

C. For Contributory Negligence on the Part of the Appellant, His Purported Negligence Must Concur or Cooperate With the Negligent Act of the Defendant.

Before negligence of the plaintiff can rise to the heights of contributory negligence that negligence must concur or cooperate with the negligent act of the defendant, both being the proximate cause of the injury or damage complained of. For the sake of argument, if the aforementioned facts could be construed an omission or violation of a legal duty owing the defendants on the part of the plaintiff's employees or agents, and therefore negligence, it is the appellant's position that the defense of contributory negligence would not be available to the defendants and the Court erred in instructing the jury on contributory negligence.

> "The rule as to when a directed verdict is proper heretofore referred to, is applicable to questions of proximate cause."

Brady v. Southern Ry. Co., 320 U. S. 476;

Atchison Topeka & Santa Fe Ry. Co. v. Toops, 281 U. S. 351;

St. Louis etc. Ry. Co. v. Mills, 271 U. S. 344;

N. Y. Central Ry. Co. v. Ambrose, 280 U. S. 486;

Baltimore & Ohio Ry. Co. v. Tindall, 47 F. (2d) 19.

Where but one deduction can be drawn from the evidence, as in the instant case, the question of proximate cause is one of law only.

Zibbell v. Southern Pacific Co., 160 Cal. 237; 116 Pac. 513;

Flores v. Fitzgerald, 204 Cal. 374; 268 Pac. 369;

White v. Davis, 103 Cal. App. 531; 284 Pac. 1086;

Donegan v. Baltimore & N. Y. Ry. Co., 165 Fed. 860;

Winters v. Baltimore & Ohio Ry. Co., 177 Fed. 44; 100 C. C. A. 462;

Hales v. Michigan Central Ry. Co., 200 Fed. 533; 188 C. C. A. 627;

San Francisco & P. S. S. Co. v. Carlson, 161 Fed. 851; 89 C. C. A. 45;

Pacific SS Co. v. Holt, 77 F. (2d) 192;

Jennings v. Davis, 187 F. 703; 109 C. C. A. 451.

"Proximate cause is an act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted; the dominate cause, not one which is incidental to that cause."

Herron v. Smith Bros. Inc., 116 Cal. App. 518; 2 P. (2d) 1012;

Sawdey v. R. W. Rasmussen Co. et al., 210 Cal. 190; 290 Pac. 684;

Rauch v. Southern Calif. Gas Co., 96 Cal. App. 250; 273 Pac. 1111.

It is the general rule of law that an original act of negligence is not a proximate cause of an injury when the same directly results from an intervening act of another party which was not to be reasonably anticipated by the first party as likely to occur and follow through from his own act.

> "Recovery of the plaintiff is not barred if his negligence is so remote as to constitute a condition and not a cause."
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> *Rush v. Lagomarsino, supra;*
>
> *Gaster v. Hinkley, supra;*
>
> *Hartford v. Pac. Motor Trucking Co., supra.*

In 1 Thompson on Negligence, page 210, Section 216, it is said:

> "In order, then, to prevent a recovery by reason of contributory negligence, the plaintiff or person injured must have been guilty of want of ordinary care; and we shall see that this want of ordinary care must have been a proximate cause of the injury, and not a remote cause or mere condition. If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages, if notwithstanding such remote negligence of the plaintiff the defendant might have avoided the injury by the exercise of ordinary care. But if a want of ordinary care on the part of the person injured *concurs* as a proximate cause in producing the injury, the defendant is not liable, although in fault. * * * it must be such that, by the usual course of events, it would result, unless independent disturbing moral agencies intervened, in the particular injury."

From the undisputed evidence, the tests being conducted on the Government's P-51 plane were carried out under the custom and usage and practice in effect at the Los Angeles Municipal Airport. And, further, the undisputed facts show that the operators of the air traffic control tower did not notify taxiing planes of obstructions on diagonal runways when they were in plain sight.

It cannot be said that the Government pilot, Pitcairn, could reasonably anticipate at the time he was waiting in the parked plane for the tractor to tow the plane to the ramp that Defendant Pilot Scott would fail to see the parked airplane which was in plain sight. Neither could the operators of the air traffic control tower reasonably anticipate that Defendant Pilot Scott would fail to see the P-51 parked on the diagonal runway. To support this argument it must be kept in mind that the collision occurred in broad daylight; the Government plane was parked so that there was more than 120 feet of clearance on the diagonal runway for Defendant Pilot Scott to use in taxiing by; and, further, that it was uncontradicted in the testimony that the operators of the air traffic control tower did not warn taxiing pilots of obstructions in plain sight on the field. On this theory, therefore, it cannot be said that the fact that the Government's plane was parked on the diagonal runway, or that the operators of the air traffic control tower had not notified Defendant Pilot Scott that the Government plane was so parked, would be the cause which in the natural order of things and under the circumstances would necessarily produce the injury. The efficient cause and the proximate cause of the plaintiff's damage was the failure of Defendant Pilot Scott in looking and failing to see what was in plain sight. The facts clearly show Defendant Pilot Scott could have avoided

the accident had he been exercising that degree of care required of him in operating the S.B.D. plane of Defendant Douglas Aircraft Company.

The only possible view that can be taken of the evidence was that Defendant Pilot Scott either did not look at all or, if he did, that he saw the airplane and carelessly taxied into it. His act, being negligent, is a matter of law.

D. There Was No Evidence of Unavoidable Accident Present.

The trial court, over the objection of the plaintiff, gave Defendants' Instructions No. 24 on unavoidable accident. It is submitted this was error. In *Eigner v. Rase,* 129 P. (2d) 444; 54 Cal. App. (2d) 506, the Court said:

> "When we refer to an unavoidable accident, we do not mean one which it was physically impossible in the nature of things for the defendant to have prevented, but one in which ordinary care and diligence could not have prevented the happening of the thing that did happen; in other words, that what occurred happened unexpectedly and without fault and not because of negligence. The term 'unavoidable accident' has been defined as meaning an accident which cannot be avoided by that degree of prudence, foresight, care and caution which the law requires of anyone under the circumstances of the particular case, and which is not occasioned in any degree by want of such care and skill as the law holds every person bound to exercise. In short, an unexpected catastrophe or happening which occurs without anyone being to blame for it; that is, without being guilty of negligence in doing or permitting to be done, or omitting to do, a particular thing, which act or omission caused plaintiff's injury."

See also

Jolley v. Clemens, 28 Cal. App. (2d) 55; 82 P. (2d) 51;

Polk v. Los Angeles, 26 Cal. (2d) 519; 159 P. (2d) 931.

The evidence here shows without contradiction that Defendant Pilot Scott had the S.B.D. airplane under control; was taxiing the plane by S-ing from left to right; that his view was unobstructed; and that Defendant Pilot Scott looked but did not see the parked P-51 plane of the plaintiff. Either Defendant Pilot Scott did not look or looked and did not see what was in plain sight. Had he looked or seen the parked P-51 airplane the accident could have been prevented. Defendant Pilot Scott did not use ordinary care under the circumstances and therefore was negligent, and where there is negligence it will be found that the accident was not unavoidable because it could have been foreseen.

E. The Court Erred in Not Granting Plaintiff's Motion for a Directed Verdict or, in the Alternative, a New Trial.

Plaintiff made a timely motion for a directed verdict which was denied by the trial court.

Where, as in the instant case, the facts established and the conclusions reasonably justified, as heretofore stated and argued, are legally insufficient to support the verdict in favor of the defendant, the Court must grant the mo-

tion for a directed verdict on the part of the plaintiff and it is error to refuse it.

> "Court must grant motion for directed verdict whenever facts established and conclusions reasonably justified are legally insufficient as foundation for verdict in favor of plaintiff." (*Chesapeake & O. Ry. Co. v. Martin,* 51 S. Ct. 453, 283 U. S. 209, 75 L. Ed. 983, reversing 143 S. E. 629, 154 Va. 1, and *Chesapeake & O. Ry. Co. v. Martin,* 51 S. Ct. 23, 282 U. S. 819, 75 L. Ed. 732.
>
> *McCarthy v. N. Y. N. H. & H. R. Co.,* 240 F. 602; 156 C. C. A. 406;
>
> *Steerman v. Baltimore O. R. Co.,* 6 App. D. C. 56;
>
> *Elliott v. Chicago M. & St. P. Ry.,* 14 S. Ct. 85; 150 U. S. 245.

> "A federal court, in which a jury has rendered a verdict, may set it aside when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and, in the exercise of a legal discretion, may properly do so, though it would not have been proper to direct a verdict.
>
> *Felton v. Spiro,* 78 Fed. 576, 24 C. C. A. 321;
>
> *Wright v. Southern Exp. Co.,* 80 Fed. 85.

It is submitted that in view of the evidence the trial court in its discretion should have set aside the verdict of the jury and granted the plaintiff a new trial.

II.

The Evidence Is Insufficient to Sustain the Verdict of the Jury.

Although this point is very closely connected with Point I hereinabove, and involves the same principles of law, we will, at the risk of being repetitious, point out to this Honorable Court how and in what manner the evidence fails in every way to justify the verdict for the defendants.

Under the undisputed facts, and by the defendant's own testimony, he was under a duty in taxiing an airplane to taxi at a slow rate of speed and make S turns from left to right at a 15° angle. The basis for such precautions was to enable the pilot at all times to observe any person or property in his path so that he might control his instrumentality and avoid running into any persons or property, causing injury or damage to others. This Defendant Pilot Scott attempted to do and he failed in his duty. By his own admission he looked and did not see the parked plane of the defendants which, from the evidence, was in plain sight. And by reason of his failure to see the plane of the plaintiff he negligently ran into it. There is no evidence in the record which would show a violation of a duty owing the defendants in the parking of the plaintiff's plane on the diagonal runway. This was the usage and custom at the Los Angeles Municipal Airport. Neither was there any omission of any duty on the part of the operators of the air traffic control tower in not giving the defendant pilot notice that the Government plane was so parked. The evidence showed without any equivocation that such a notice was not necessary if the parked airplane was in plain view. To go one step further, where obstructions were in plain view on the diagonal runways, it

was testified without any denial, the custom and usage at the Los Angeles Municipal Airport was not to call the attention of taxiing pilots to such objects. There was not one scintilla of evidence put before the trial court and the jury from which even an inference could be drawn to support the theory that the plaintiff's agents or employees were in any way contributorily negligent.

Taking the evidence *in toto* most favorable to the defendants, it is the Government's position that no reasonable inferences of contributory negligence on the part of the plaintiff's agents or employees can be drawn from the evidence introduced at the trial. Rather, it shows conclusively that the defendant pilot was negligent and his negligence was the proximate cause of the damage.

Conclusion.

In conclusion, it is the appellant's contention, and it is so borne out in the evidence in this case, and the applicable law thereto, that the cause should not have been submitted to the jury and the plaintiff's motion for directed verdict at the conclusion of the trial should have been granted. This contention is based on the evidence which is conclusive and undisputed, and on the applicable law which without equivocation discloses that no acts of the plaintiff constituted contributory negligence and that the proximate cause of the plaintiff's damage was the negligence of the defendants. Nor do we believe, for the same reasons, that the evidence is sufficient to justify a verdict in favor of the defendant.

For these reasons we respectfully ask this Honorable Court to set aside the judgment heretofore entered by the lower court and the verdict of the jury, and also direct the lower court to enter judgment for the plaintiff, and for such other and further relief as may seem just in the premises.

Respectfully submitted,

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